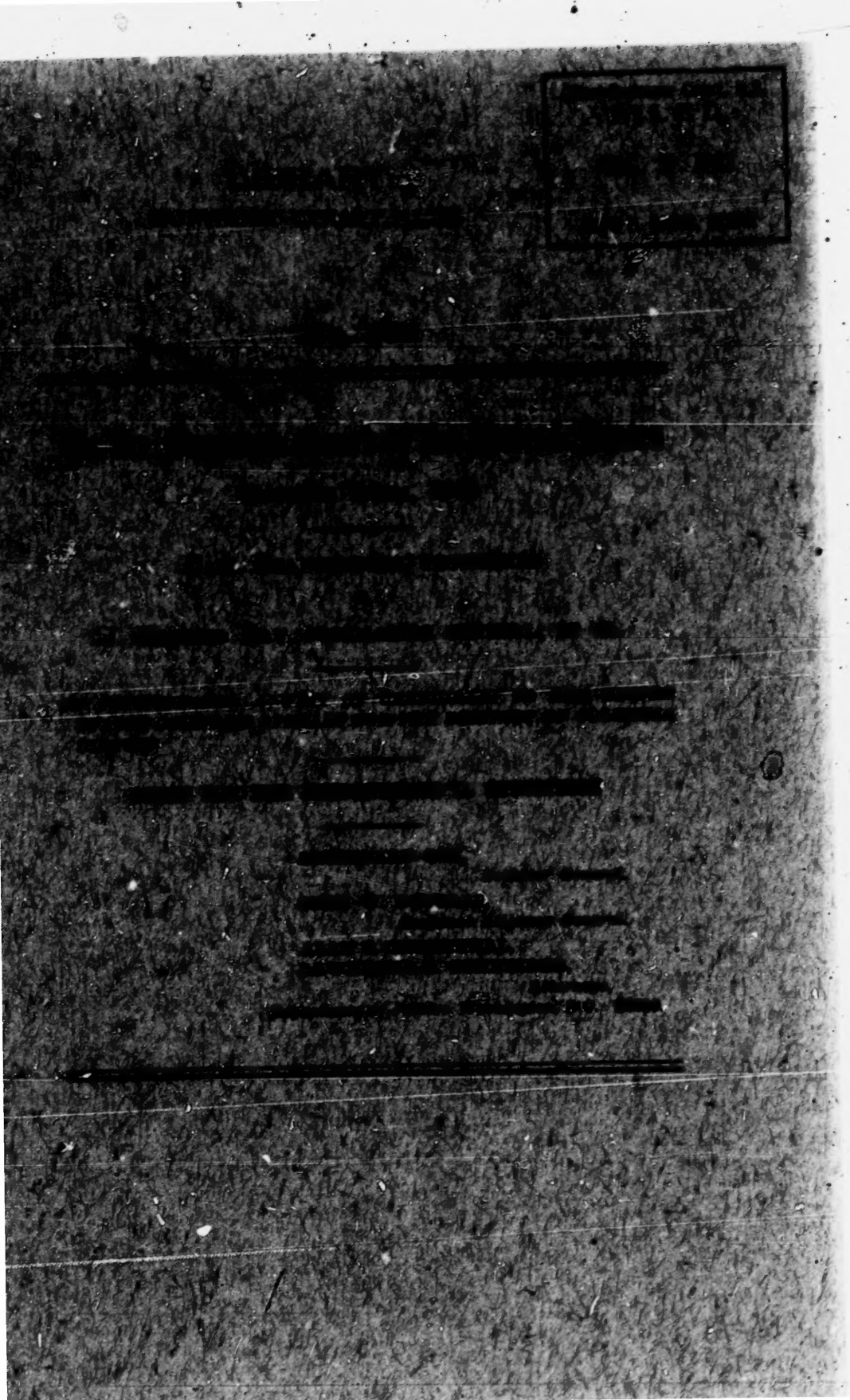


In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 250

CARL BRANDENFELS, PETITIONER

v.

J. EDWARD DAY, POSTMASTER GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The district court rendered no opinion. The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 23-32) is reported at 316 F. 2d 375.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1963. A timely petition for rehearing was denied on April 2, 1963. The petition for a writ of certiorari was filed on July 1, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, insofar as it sought injunctive relief against the members of the Federal Trade Commis-

sion and declaratory relief against Post Office officials, petitioner's complaint presented a case or controversy within the meaning of Article III, Section 2 of the Constitution.

2. Whether petitioner, having agreed to the procedures followed by the Post Office Department, is now entitled to an order compelling the Post Office to act contrary to that agreement.

STATUTES INVOLVED

1. The Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001, et seq. provides in relevant part:

> Section 6(a) [5 U.S.C. 1005(a)]. * * * Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives * * *
>
> * * * * * *
>
> Section 10(e) [5 U.S.C. 1009(e)]. So far as necessary to decision and where presented the reviewing court * * * shall (A) compel agency action unlawfully withheld or unreasonably delayed; * * *
>
> * * * * * *

2. 28 U.S.C. 2201 provides:

> CREATION OF REMEDY
>
> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought. Any

such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT

In May 1949, the Post Office Department charged petitioner with distributing fraudulent advertising through the mails to promote the sale of his hair-growing treatment, in violation of 39 U.S.C. (1946 ed.) 259. After lengthy hearings before a hearing examiner, an Initial Decision adverse to petitioner was entered in February 1954 by the Deputy Postmaster General, the hearing examiner having resigned in the interim. Petitioner filed an intra-departmental appeal from the Initial Decision, which culminated, in March 1958, in the dismissal of the proceeding without prejudice. This disposition resulted from a recognition that the Initial Decision had been prepared by the agency officer who had prosecuted the charges against petitioner, in violation of section 5(c) of the Administrative Procedure Act, 5 U.S.C. 1004(c), and that the procedural error precluded the issuance of a valid fraud order.

Petitioner objected to a dismissal without prejudice, on the grounds that the evidence required a decision on the merits in his favor and that the proceeding had subjected him to substantial expense and harmful publicity. In November 1958, however, petitioner and the newly established Judicial Officer of the Post Office Department agreed that the latter would review the record to determine whether the order of dismissal should be modified so as to be with

prejudice. The Judicial Officer, upon review of the record, declined to modify the prior dismissal. Petitioner's motion to reconsider was denied, as was his motion to vacate the order denying reconsideration. No Post Office proceedings are now pending against petitioner, and no fraud order or other sanction has been imposed against him. However, petitioner alleges that the Federal Trade Commission now "proposes to * * * institute a proceeding against plaintiff charging him with misrepresenting his treatment by claiming it to be efficacious for the purposes advertised, raising the very same issues as were involved in the Post Office proceeding * * *" (Pet. 25).

In December 1960, petitioner instituted the present action in the district court, naming officials of the Post Office Department and members of the Federal Trade Commission as defendants and seeking the following relief: (1) a declaration that the postal proceedings were conducted improperly; (2) a declaration that petitioner's advertising was not fraudulent; (3) an order enjoining both agencies from proceeding further against petitioner in connection with the same or essentially identical charges; and (4) such other and further relief as is meet and just.

The district court dismissed the complaint on the ground that it failed to state a claim upon which relief could be granted. The court of appeals, in affirming, held that the complaint, insofar as it sought injunctive relief against the members of the Federal Trade Commission and declaratory relief against Post Office officials, should have been dismissed for lack of

jurisdiction because of the absence of a case or controversy. The court further ruled that, while the district court possessed jurisdiction to compel the Post Office to dismiss the charges against petitioner with prejudice, on the facts of this case such relief would have been inappropriate (Pet. App. 29).

ARGUMENT

The determination of the court of appeals is clearly correct and presents no question of general importance. Further review, therefore, is unwarranted.

1. (a) It is axiomatic that the exercise of judicial power is limited to "cases" and "controversies" within the meaning of Article III, Section 2 of the Constitution. *Rochester Telephone Corporation* v. *United States*, 307 U.S. 125, 130-131; *Muskrat* v. *United States*, 219 U.S. 346, 356-357. In the instant case, the Federal Trade Commission has taken no action against petitioner and the nature of any charges which might emerge from an investigation undertaken by the Commission is necessarily conjectural. Such charges may never be filed at all, and if they are, petitioner will be required to exhaust his remedies before that agency prior to seeking relief in the courts. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 499-500; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48.[2]

[2] Petitioner, in contending that the complaint against the Federal Trade Commission should not have been dismissed, argues that its case against the FTC is not independent of its suit against the Post Office, since any charges by the former would be the same as those brought by the latter (Pet. 21). This contention has no merit. Even a decision in the postal proceedings in petitioner's favor would not necessarily preclude

Since there plainly is not, as yet, a case or controversy between petitioner and the members of the Federal Trade Commission, the district court has no jurisdiction to hear and determine this matter.

(b) Similarly petitioner is not entitled to a determination of the abstract question whether he is guilty of fraud, notwithstanding the allegations of financial injury and harm to his business reputation (Pet. 8–9.) The Post Office Department, in terminating its proceedings against petitioner neither held that his practices were fraudulent nor imposed any sanctions against him. Accordingly, as the declaratory jurisdiction of the district court, 28 U.S.C. 2201, 2202, may be invoked only where a complaint is predicated upon an "actual controversy" (*Evers* v. *Dwyer*, 358 U.S. 202, 203; *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273; cf. *Poe* v. *Ullman*, 367 U.S. 497, 505–506), such jurisdiction was lacking here.[2]

2. The court below was also correct in holding that, in the unique circumstances of this case, there was no basis for compelling the Post Office to enter a final decision with prejudice or to set aside its order refusing to do so (Pet. App. 29). As the court stressed, petitioner expressly consented to the procedure of which he now complains (Pet. 31).

---

further action by the Federal Trade Commission, as these agencies act under different statutes and employ different standards. 39 U.S.C. (Supp. II, 1959–60) 4005; 15 U.S.C. 45, 52, 55; see *Reilly* v. *Pinkus*, 338 U.S. 269, 276–277.

[2] Petitioner's only argument on this point is an assertion that "if the court had upheld review of the dismissal order * * * declaratory relief against * * * the Post Office Department would have been proper * * *" (Pet. 20).

Upon discovering that a procedural defect precluded the issuance of a valid fraud order, the Post Office had several reasonable alternatives open to it. Since there was no defect in the record compiled before the hearing examiner, the Postmaster General or his delegate could himself have decided the case, or the case could have been remanded to another examiner for a second Initial Decision. Instead, the Post Office chose to dismiss the proceeding without prejudice. After expressing his dissatisfaction with this action, petitioner entered into an agreement with the Judicial Officer whereby the latter was to review the case on the merits and either dismiss the proceeding with prejudice or, if he rejected petitioner's contentions, dismiss the proceeding without prejudice to the filing of a new complaint. No other alternative was proposed. The arrangement was highly advantageous to petitioner, who stood to gain a complete exoneration if the Judicial Officer ruled favorably, and could lose nothing if the ruling on the merits were adverse, there being no provision for the issuance by the Judicial Officer of a valid fraud order.

After reviewing the record and hearing petitioner's oral arguments, the Judicial Officer concluded that a dismissal with prejudice was unjustified. Since petitioner consented to this method of disposition and, quite understandably, did not press for the kind of adjudication on the merits which might have resulted in the issuance of a fraud order, he cannot now complain merely because the Judicial Officer decided against him. Cf. *United States Bio-Genics Corp.* v. *Christenberry*, 173 F. Supp. 645, 649 (S.D.N.Y.) af-

firmed, 278 F. 2d 561 (C.A. 2); *Democrat Printing Company* v. *Federal Communications Commission*, 202 F. 2d 298, 305 (C.A.D.C.); *N.L.R.B.* v. *J. L. Hudson Co.*, 135 F. 2d 380, 383–384 (C.A. 6), certiorari denied, 320 U.S. 740; *United States* v. *Vitasafe Corporation*, 212 F. Supp. 397, 398 (S.D.N.Y.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

ALAN S. ROSENTHAL,
LAWRENCE R. SCHNEIDER,
Attorneys.

AUGUST 1963.

U.S. GOVERNMENT PRINTING OFFICE 1963